October 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part III—Witnesses, Opinions, and Expert Testimony (MRE Articles VI and VII)

2.31 Self-Incrimination

B. Assertion of Privilege

After the first quote on page 83, insert the following text:

A witness may invoke his or her Fifth Amendment privilege where the danger of self-incrimination is "real and probable" not "imaginary and unsubstantial." *Davis v Straub*, ___ F3d ___, ___ (CA 6, 2005), quoting *Brown v Walker*, 161 US 591, 608 (1896). In *Davis*, a murder witness provided one *Mirandized* and one non-*Mirandized* statement to police, both of which tended to exonerate the defendant. When the defense attorney called the witness to testify at trial, the prosecutor asked the court to inform the witness of his privilege against self-incrimination because he was still a suspect. The trial court appointed an attorney for the witness, and after consulting with the attorney, the witness chose not to testify. After concluding that the witness could incriminate himself by admitting to his presence at the scene of the murder, the trial court allowed the witness to assert a blanket Fifth Amendment privilege and refuse to answer any questions.

The United States Court of Appeals for the Sixth Circuit held that the trial court erred in deciding that "[the witness] could avoid any questions because he had a reasonable basis to fear self-incrimination, and invoke a blanket assertion of the Fifth Amendment." In light of the fact that the witness had provided a *Mirandized* statement that could be used against him if he was charged with a crime, the *Davis* Court concluded that if required to testify to

his presence at the murder scene, the witness could not incriminate himself more than he had already done; therefore, the witness did not have a "real and probable" apprehension of further incriminating himself.

Finally, the Court noted the importance of balancing a defendant's Sixth Amendment rights with a witness's privilege against self-incrimination:

> "[U]nlike cases where the individual invoking the privilege is also the defendant, in the instant case the Sixth Amendment creates a countervailing right in [the defendant] that requires the court to compel [the witness] to respond to questions that raise only 'imaginary and unsubstantial risk' of further incrimination. Questions regarding [the witness]'s presence at the scene fall into this category, and it was a violation of [the defendant]'s Sixth Amendment rights not to compel [the witness] to respond to them."

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

G. Is Exclusion the Remedy if a Violation Is Found?

1. Good-Faith Exception

Insert the following case summary after the June 2005 update to page 348:

In determining whether the good-faith exception applies to a search conducted pursuant to an invalid search warrant, *United States v Laughton** does not establish a blanket prohibition against a reviewing court's consideration of evidence not included in the four corners of the affidavit on which the warrant was based. *United States v Frazier*, ___ F3d ___ (CA 6, 2005). According to *Frazier*, information known to a police officer *and* provided to the issuing magistrate—even if it was not included in the four corners of the affidavit in support of the warrant—may be considered in determining whether an objectively reasonable officer was justified in relying on the warrant.

*409 F3d 744 (CA 6, 2005).

The Sixth Circuit concluded that the facts in *Frazier* were distinguishable from the facts in *Laughton* because "[*Laughton*] gives no indication that the officer who applied for the search warrant provided the issuing magistrate with the information omitted from the affidavit." *Frazier*, *supra* at ___. For purposes of determining whether the good-faith exception should apply to an unlawful search, *Laughton* prohibits the consideration of information not found within the four corners of the affidavit when there is no evidence that the information was provided to the magistrate who issued the warrant. According to *Frazier*, information known to an officer but not found in the supporting affidavit may be considered if the information was revealed to the issuing magistrate.